February 17, 2009

EXHIBIT 4 BUH
DATE 2-17-09
HB 589

To: **Members of the House Business and Labor Committee**
From: **Steven S. Carey and David T. Lighthall**
Subject: **Please Support HB 589**

To those who thought the day of providing unequal benefits to workers who experienced occupational diseases as opposed to injuries was over, think again. The 2005 Legislature ignored the trifecta of Montana Supreme Court cases which identified and eliminated the constitutional infirmities in the Occupational Disease Act ("ODA"), and passed § 39-71-407(9), MCA. Section 39-71-407(9), MCA, is the workers' compensation equivalent of retreating from comparative negligence to contributory negligence, targeting specifically occupational disease claimants only.

In *Henry v. State Compensation Ins. Fund*, 1999 MT 126, 294 Mont. 449, 982 P.2d 456, the Montana Supreme Court determined that the ODA violated the equal protection clause of the Montana Constitution in that it denied vocational rehabilitation benefits to workers with occupational diseases. In *Stavenjord v. Montana State Fund*, 2003 MT 67, 314 Mont. 466, 67 P.3d 229, the Court took the next step and determined that there was no rational basis for providing greater permanent partial disability benefits to workers who experienced injuries as opposed to those who experienced occupational diseases. Finally, the Supreme Court found the apportionment statute in the ODA violated equal protection in *Schmill v. Liberty Northwest Ins. Corp.*, 2003 MT 80, 315 Mont. 51, 67 P.3d 290.

The Legislature has now brought apportionment back with a vengeance by requiring workers to prove that their work activities are the major contributing cause of their condition in relation to all other factors.

I. APPORTIONMENT HISTORY

The post-1987 definitions of "injury" in the Montana Workers' Compensation Act ("WCA") and "occupational disease" in the Montana Occupational Disease Act, created two classes of workers distinguished "only by the time over which an affliction was contracted" by members of the respective classes. *Schmill*, 2003 MT 80, ¶ 17, 315 Mont. 51, ¶ 17, 67 P.3d 290, ¶ 17. An "injury" was physical harm to a worker caused by a specific event on a single day or during a single work shift. Section 39-71-119(1)-(2), MCA (2003). An "occupational disease" was harm which was caused by events occurring on more than a single day or a work shift. Section 39-71-102(1), MCA (2003).

The Montana Supreme Court, as indicated above, held that "injury" and "occupational disease" claimants are similarly situated for equal protection purposes.

Prior to the 2005 Legislative change, the WCA and the ODA employed similar standards of causation. Under the WCA, a claimant was subject to a "more probable than not" standard of causation. Section 39-71-407(2), MCA (2003). Under the ODA, the claimant was subject to a similar "proximate cause" standard. Section 39-72-408(1), MCA (2003).

Additionally, the WCA and ODA each provided for payment of certain compensation and medical benefits in the event an otherwise non-compensable disability was aggravated by a claimant's employment activities. *See* § 39-71-407(2)(a)(ii), MCA (2003); § 39-72-706(1), MCA (2003).

However, the ODA added another layer of difficulty. After the physician determined whether the occupational disease could be "fairly traced to the employment as the proximate cause", the physician was further required to "determine by percentage the amount of the occupational disease that was attributable to work rather than to activities or conditions unrelated to the employment." Section 39-72-408, MCA (2003). The compensation available to the worker was reduced by that percentage attributable to non-work related causes. Section 39-72-706, MCA (2003); *see Davis v. Liberty Northwest Ins. Corp.*, 1994 MTWCC 78.

In *Schmill*, an occupational disease claimant challenged the constitutionality of the ODA's apportionment provisions after her employer's insurer agreed to pay an impairment award pursuant to *Stavenjord*, 2003 MT 67, but nevertheless deducted twenty-percent from the award for non-occupational factors that contributed to her disability under § 39-72-706, MCA. *Schmill*, 2003 MT 80, ¶ 7. Schmill argued that her impairment award as an ODA claimant should be the same as if she were an injury claimant under the WCA, and that the apportionment of benefits pursuant to § 39-72-706, MCA, violated her right to equal protection of the law. *Id.*

In confirming its observation in *Henry* and *Stavenjord* that injury and occupational disease claimants are similarly situated, the Court agreed with Schmill and further observed "the WCA does not take non-occupational factors into consideration while the ODA does." *Id.* at ¶ 22. The *Schmill* Court thus held that there was no rational basis for the apportionment of benefits under § 39-72-706, MCA, of the ODA while providing full benefits for injured workers pursuant to the WCA. *Id.* at ¶ 23. The Court additionally dismissed the argument that "economic justifications" were legitimate government objectives to treat injury and occupational disease claimants differently. *Id.* at ¶ 15.

II. APPORTIONMENT REAPPEARS AS MAJOR CONTRIBUTING CAUSE

In an attempt to exorcize the unconstitutional provisions from the occupational disease analysis, the Legislature repealed the ODA in its entirety in the 2005 session. Occupational diseases are now addressed under the current version of the WCA, which echoes the Montana Supreme Court's directive in providing that "[c]ompensation for occupational diseases must be equal to the compensation and medical benefits provided for injuries under this chapter." Section 39-71-713(1), MCA (2007). But what the Legislature hath given the OD claimant under the revised WCA, it also taketh away.

Contrary to the Court's mandate in *Schmill*, the Legislature enacted a new "major contributing cause" standard of causation for OD claimants that not only gives apportionment new life and vigor, but does so with harsher consequences than those under the former ODA. The current version of § 39-71-407, MCA, also disparately provides benefits to the "injury" claimant where a physician determines it is "more probable than not that . . . a claimed injury aggravated a preexisting condition," but is silent on the issue of "aggravations" in the OD context. Consequently, the Legislature has effectively abrogated years of case law on this subject.

This sea change in the law, as one insurer's counsel refers to it, is currently codified at § 39-71-407(9), MCA, which provides:

> Occupational diseases are considered to arise out of employment or be contracted in the course and scope of employment if: (a) the occupational disease is established by objective medical findings; and (b) the events occurring on more than a single day or work shift *are the major contributing cause of the occupational disease in relation to other factors contributing to the occupational disease.*

Ironically, the *Schmill* holding was premised on the Court's conclusion that the WCA did not apportion non-occupational factors in its compensation calculations while the ODA disparately required "that compensation be reduced by the percentage an injury is attributable to non-occupational factors." *Schmill*, 2003 MT 80, ¶ 19; § 39-72-706, MCA. In referencing "other factors contributing to the occupational disease," the Legislature and proponents of the "major contributing cause" standard patently ignored the Court's conclusion and corresponding invalidation of the ODA's apportionment provisions.

Apparently, the Legislature and proponents of the "major contributing cause" standard were convinced that there was a rational basis on which to discriminate between injury and OD claimants. As noted above, this conviction has resulted in harsher consequences to the OD claimant under the WCA than those that arose with apportionment under the ODA. Under the ODA, an occupational disease claimant was entitled to at least *some* percentage of wage loss benefits relative to disability "proximately caused" by occupational factors, and *all* related medical benefits. With application of the new standard of causation under § 39-71-407(9), MCA, the claimant is not entitled to *any* benefits unless there is a showing, upon *apportionment* of the occupational and non-occupational factors contributing to an OD, that occupational factors are the *major contributing cause* of the OD. In applying the new standard to actual cases, the Legislature now requires an apportionment analysis in each occupational disease case. Satisfying the new standard may prove difficult in numerous circumstances.

For instance, occupational diseases often become disabling only after a claimant has worked in a single field (i.e., carpentry) for many years and for several different employers. The claimant's work for each employer will have contributed in part to the development of an OD, which will be determined by the treating physician to have been "proximately caused" by work activities performed with each employer. When apportioned, however, none of the employment positions may be determined to be the "major contributing cause" of the OD standing alone. Thus, when the claimant files a claim with his fourth employer at age 50, he may be denied benefits altogether with application of the heightened standard of causation imposed on OD claimants at present. On the other hand, the "injury" claimant would be entitled to all appropriate benefits with a simple showing that it was "more probable than not" that the work activities caused a claimed injury.

The effect is the same where several non-occupational factors, such as recreational activities, age, and household activities, contribute to a condition in concert with occupational factors. This reality is demonstrated in the following exchange which comes from a physician report obtained by an insurance carrier:

> **Question:** If [the claimant] is suffering from an occupational disease, is his employment the major contributing factor of the occupational disease in relation to other factors to include non-work related activities? If yes, please explain.
>
> **Answer:** . . . we believe that his occupation has been a significant factor to his condition. We have no way of determining *or apportioning* such causation. We would tend to agree with Dr. — that the occupational exposure has resulted in aggravation of an underlying and pre-existing degenerative process.

In this instance, the insurer's question specifically asks for the major contributing cause and the physicians indicates they can't apportion. This exchange clearly demonstrates that a physician (and anyone else taxed with applying the statute) views the new "major contributing cause in relation to other factors" standard to be an attempt to apportion causative factors. The new standard is in effect synonymous with apportionment, and simply avoids the use of the word "apportionment". Nevertheless, the new statute has re-introduced apportionment to causation of an occupational disease, only in a more virulent form for the claimant and his physician.

This exchange further highlights the failure of the Legislature to acknowledge and codify the years of case law recognizing that an aggravation of a pre-existing occupational disease is, and should continue to be, compensable. *See Liberty Northwest Ins. Co. v. Champion International Corp.*, 285 Mont. 76, 80, 945 P.2d 433, 436 (1997) ("aggravation" of a pre-existing condition compensable as an occupational disease where claimant's "work . . . was a significant factor in his *increasing pain* and, ultimately, his inability to work").

This failure to recognize the well-established aggravation principle hopelessly complicates application of the "last injurious exposure" rule set forth at § 39-71-407(10), MCA, which provides "[w]hen compensation is payable for an occupational disease, the only employer liable is the employer in whose employment the employee was last injuriously exposed to the hazard of the disease." Applied in the context of multiple employers, this rule of liability was traditionally interpreted under the "proximate cause" and "aggravation" standards set forth in the ODA and case law interpreting the standards. *See* § 39-72-303, MCA (2003); *Champion International*, 285 Mont. 76, 945 P.2d 433. With the imposition of the new standard of causation for OD claimants, the phrase "last injuriously exposed" is rendered nearly meaningless as any such exposure must also be the "major contributing cause" of an occupational disease.

III. CONCLUSION

The "major contributing cause" standard not only creates a mess, but it facially discriminates between similarly situated injury and OD claimants in violation of the OD claimant's constitutional right to equal protection. The practical effect of this standard has been to reduce benefits available to workers experiencing occupational diseases as opposed to workers who experience injuries. When the 2005 Legislature enacted § 39-71-407(9), MCA, solons clearly saw a fork in the road, and took it. And now, "It's deja vu all over again" for claimants' attorneys practicing workers' compensation law.

Steve Carey and Dave Lighthall practice law in Missoula, Montana, with Carey Law Firm, P.C. Mr. Carey has been a member of the MTLA since 1984. Mr. Lighthall has been a member of MTLA since 2006. They presently have briefs on this issue pending before the Workers' Compensation Court.